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Charles R. Kennedy and Rebecca Kennedy v. The Bank of Ephraim et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

CHARLES R. KENNEDY and REBECCA KENNEDY, his wife,	:	
Plaintiffs and Appellants,	:	APPELLANTS' BRIEF
vs.	:	
	:	Civil No. 15694
THE BANK OF EPHRAIM, a Utah corporation, GEORGE BARTON and BERTHA BARTON, his wife, VIRGIL P. JACOBSEN, CURTIS J. ARMSTRONG, L. CANNON ANDERSON and RUEL E. CHRISTENSEN,	:	
Defendants and Respondents.	:	

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STATEMENT OF THE CASE

This case was brought by plaintiffs to recover damages based on failure of the defendant BANK OF EPHRAIM to enforce certain obligations against a co-maker of a note and for damages arising out of various acts of intentional interference with business relations and slander. Defendants BARTON counterclaimed on various grounds, including obligations claimed due from one of the plaintiffs.

DISPOSITION IN THE LOWER COURT

After trial before The Hon. Peter F. Leary, Judge in the Third Judicial District, sitting with a jury, seven of plaintiffs' ten causes of action were dismissed by the court and three causes of action were submitted to the jury, resulting in verdicts for defendants and against plaintiffs. As to the counterclaims of defendants BARTON, the jury gave judgment against plaintiff CHARLES R. KENNEDY on three causes of action, found for plaintiffs and against counterclaimants on two causes of action and the court dismissed the Sixth Cause of Action of counterclaimant GEORGE BARTON and all of the counterclaims of BERTHA BARTON.

RELIEF SOUGHT ON APPEAL

Appellants respectfully request that the court reverse portions of the judgment on which the trial judge ruled as a matter

of law and direct entry of judgment in favor of plaintiffs with respect to enforcement of the obligations of defendant GEORGE BARTON. Plaintiffs also seek revision of one jury verdict which was contrary to the evidence and the instructions.

STATEMENT OF FACTS

Plaintiff CHARLES P. KENNEDY (hereinafter "KENNEDY") and defendant GEORGE BARTON (hereinafter "BARTON") were close personal and business associates for many years. Their business associations included a "joint venture" along with several other persons doing business as an unincorporated group, loosely referred to as a partnership, but otherwise known as the Barton Syndicate. This group, organized prior to 1967, owned certain mining claims in the Oquirrh Mountains of Salt Lake Valley (R. 652). (The court will observe that for consistency, appellants refer to the pages of both the Reporter's Transcript and the clerk's collection of documents by the page number assigned by the clerk in preparing the record for appeal, notwithstanding that a different page number was originally assigned in the transcript by the reporter).

In the fall of 1967, KENNEDY desired additional funds for other business purposes and consulted with BARTON concerning obtaining a loan from defendant THE BANK OF EPHRAIM (hereinafter the "BANK"). At that time and at all times since, BARTON was a Director of the BANK as well as a substantial stockholder (R. 893).

BARTON wrote a letter of recommendation to the BANK in connection with KENNEDY's application for a $40,000.00 loan (R. 682 and Exh. 16-P). Thereafter and on or about November 27, 1967, the BANK granted to KENNEDY the loan of $40,000.00 with the stipulation in the BANK's own documents that GEORGE BARTON would be a co-signer (Exhs. 34-P and 26-d). At the time the loan was made to KENNEDY and co-signed by BARTON, KENNEDY paid BARTON the sum of $499.98 as a "commission" or a "finder's fee" pursuant to check dated November 23, 1967 (Exh. 18-P), which was subsequently endorsed by BARTON (R. 793) and paid by KENNEDY's bank on December 5, 1967 (Exh. 19-P). This fee represented part of the consideration for the co-maker's signature of BARTON, along with other transactions which continued to be engaged in between KENNEDY and BARTON.

At or about the time the loan was made, BARTON agreed to pledge a Certificate of Deposit owned by him as collateral for the loan (R. 684). That pledge was made within 60 to 90 days following granting of the loan and was designed to satisfy the bank examiners with respect to collateral on the loan (R. 786 and 899). From time to time, the loan was renewed in varying amounts, but the savings certificate continued to be pledged for the loan (Exh. 34-P and R. 785). One of the renewal notes is shown as Exh. 21-P and the savings certificate is shown as Exh. 17-P.

The loan subsequently became delinquent, but the KENNEDYS were unable to pay the amount when due. The BANK thereafter

brought suit against CHARLES R. and REBECCA Z. KENNEDY in Sanpete County, Utah. Although GEORGE BARTON was also named as a defendant in the Complaint, he was never served and no action was taken against him in connection with that matter. On or about July 19, 1973, judgment was entered against defendants KENNEDY in that action in a hearing which was held without the presence of the KENNEDYS, who had requested a continuance by reason of illness. The matter was, therefore, treated essentially as a default matter.(See the entire file in the prior action, Exh. 58-d).

Subsequently, the business and personal associations between KENNEDY and BARTON deteriorated into less friendly relationships. Disagreements arose concerning sale of claims owned by the Barton Syndicate, concerning transfers of various interests in the syndicate and also concerning efforts at collection of the judgment held by the BANK against the KENNEDYS. No effort was made to collect against GEORGE BARTON on the note.

The KENNEDYs brought suit alleging various damages against all parties in ten causes of action. After trial in this matter, the court dismissed seven of the causes of action as a matter of law plus portions of the other causes and submitted certain portions of three causes of action for jury determination. Appellants here claim that the court's orders were erroneous as they affected the obligations of GEORGE BARTON on THE BANK OF EPHRAIM note and the

savings certificate held as collateral. In addition, the jury verdicts, as hereinafter detailed, were erroneous in certain respects by reason of improper instructions from the court.

ARGUMENT

I. DEFENDANT THE BANK OF EPHRAIM SHOULD BE REQUIRED TO ENFORCE THE OBLIGATIONS OF DEFENDANT GEORGE BARTON, INCLUDING OFFSET OF THE PLEDGED SAVINGS CERTIFICATE.

A. Having purposely failed to sue defendant GEORGE BARTON, The Bank of Ephraim must be ordered to offset the pledged Certificate of Deposit.

The most serious of the wrongs here disputed on appeal relate to the knowing and intentional plan implemented by the BANK and BARTON to relieve BARTON of any responsibility whatever, notwithstanding his clear legal obligations as co-signer on the note and pledgor of collateral. The facts are clear and substantially undisputed on this point. Exh. 21-P, which was the last renewal note in the series before the note which was subsequently incorporated in a judgment, amply demonstrates the relationships of the parties. Although the KENNEDYS used the trade style "The Kennedy Company Enterprises", the note was signed by CHARLES R. KENNEDY and REBECCA Z. KENNEDY, his wife, as individuals. On the reverse of the note appears the clear language:

> Ephraim, Utah December 18, 1970
>
> FOR VALUE RECEIVED, we hereby guarantee payment of the within note, waiving demand of payment, protest and notice of non-payment
>
> /s/CHARLES R. KENNEDY
> /s/REBECCA Z. KENNEDY
> /s/GEORGE BARTON

Absolutely no question can exist regarding the intent of GEORGE BARTON and the corresponding intent of the BANK that BARTON would be obligated to pay the note when due in the event it was not otherwise paid. BARTON received consideration which was legal and enforceable (legal consideration not required to be in exact equivalent amount) when he accepted, endorsed and cashed Exh. 18-P, which evidenced his intent to receive a commission for helping KENNEDYs to obtain the loan and co-signing the loan (R. 793). BARTON acknowledged that he hoped to be paid for his services in that connection (R. 967). BARTON's obligation as co-signer was part of the design from the very inception of the first loan on November 27, 1967 (Exh. 26-d). BARTON endorsed the savings certificate as collateral to THE BANK OF EPHRAIM for the same note which was executed by the KENNEDYs and co-signed by BARTON (Exh. 17-P and R. 785). Yet BARTON acknowledged, notwithstanding his intent to pledge the CD and continue to be obligated on the note (R. 785 and 786), that he was never served with Summons in the prior action by the BANK against KENNEDYs (as confirmed by Exh. 58-d) and that no judgment was rendered against him (R. 789). Yet BARTON was more than just a passive co-obligor, who was fortunately escaping his legal obligations. By design between the BANK and BARTON, at the default hearing in 1973, BARTON appeared in court as a witness against the KENNEDYs (R. 788) and all of

this after BARTON had been so happy to recommend that the BANK make the loan to the KENNEDYs (R. 801 and Exh. 16-P).

The BANK's own summary of the initial loan (Loan Program, Exh. 26-d) was completed in the handwriting of VIRGIL JACOBSEN, former BANK President (R. 771). That document clearly shows that GEORGE BARTON was intended to be a co-signer on the note at the inception. Mr. JACOBSEN was deceased prior to the time of trial, but portions of his deposition were read into the record (R. 767-769). Without reproducing all of the relevant testimony in detail in this Brief, we believe the testimony of Mr. JACOBSEN can be summarized correctly as follows and confirms the position of KENNEDY against that of BARTON:

(a) BARTON put up the certificate at the time the loan was made because he was a friend of Mr. KENNEDY, and BARTON was willing to back the faith in him by putting up the $50,000.00 collateral.

(b) Mr. KENNEDY was not asked to put up any collateral at the time.

(c) BARTON became co-endorser of the note as well as the certificate.

(d) The BANK has never executed against the collateral and has certainly not ever requested that BARTON pay off the note.

(e) At the time the loan was made, BARTON said he would repay the loan, and that if he had to pay it he would because he didn't have any choice.

(f) If Mr. KENNEDY doesn't pay the bill, the BANK would have no recourse but to go against the collateral.

(g) The certificate was tendered by BARTON within 60 to 90 days after the original loan was made.

The foregoing testimony, especially when taken in the context of the BANK documents, clearly demonstrates that at the time the loan was made and the certificate was taken shortly thereafter, it was the full intent of both BARTON and THE BANK OF EPHRAIM that BARTON should have to pay the note, through the certificate or otherwise, in the event KENNEDY could not. It is incredible to review the record and conclude that subsequent to the default on the note and KENNEDY's inability to pay the same, THE BANK OF EPHRAIM has never made a demand on BARTON, has not exercised the right of foreclosure or offset against the certificate, did not join BARTON as a defendant through service of Summ in the prior Sanpete County action, and has knowingly and intentionally permitted a legal obligor to be relieved of obligations. The evidence in the record amply supports the claim of appellants that the court should require THE BANK OF EPHRAIM to exercise its right to offset the funds represented by the savings certificate against the past-due obligation in discharge or partial discharge thereof. It becomes clear that the BANK has knowingly permitted the statute of limitations to pass so far as any deficiency against BARTON may be concerned. The six-year statute of limitations for an action upon a liability founded upon an instrument in writin

Section 78-12-23 Utah Code Ann. 1953, as amended, would be applicable. That statute commenced running no later than April 27, 1972, when the Sanpete County action was filed (Exh. 58-d) and, thus, the statutory period expired in April, 1978, if not earlier. BARTON is left completely off the hook!

A few comments are appropriate regarding the equities of the case. The record reflects that the funds derived from the initial loan at THE BANK OF EPHRAIM were used by KENNEDY in other investments. KENNEDY acknowledged that the debt was due, subject only to such counter-claims and offsets as KENNEDY would have against THE BANK OF EPHRAIM and/or BARTON. The rhetorical question is,"Why should BARTON be forced to pay any of that debt through the certificate or otherwise?" The most fundamental answer is that he agreed to do so, and the BANK accepted the obligation in reliance on the expectation that BARTON would pay or that the certificate would be used to pay. The next fundamental answer arises from the unique relationship obviously inherent where BARTON is both a Director and a substantial stockholder of the BANK and is in a position to influence the BANK management to pursue only KENNEDY rather than pursuing him. Such improper influence should not be countenanced by this court. Moreover, KENNEDY and BARTON had other business transactions, including one that is still very much open concerning the Barton Syndicate claims, in which obligations claimed due as between BARTON and KENNEDY could properly be

adjusted. For the BANK to proceed without enforcing the just obligation against BARTON or the collateral is both immoral and unlawful.

The record contains some disagreement as to whether it was intended at the inception of the loan and the pledge of the certificate that BARTON's certificate would be the first source of funds upon default of the note in question. That issue was not clearly resolved and does not have to be in order for this court to provide the relief sought by appellants. Whether or not the certificate was to be the first source of repayment without pursuing other action is now irrelevant. The plain facts are that the certificate was to be used in the event of default, that Mr. BARTON put up the certificate for that purpose (R. 767-769), the certificate itself states that it is collateral to the loan (Exh. 17-P) and BARTON agreed in writing that he would guarantee the payment of the note (Exh. 21-P).

Even though it is not necessary for the court to determine whether or not an agreement existed regarding the certificate's becoming the first source of funds, we do believe that the verbal testimony cited above in this Brief explaining the written instruments and the intent thereof provide ample, if not mandatory, basis for this court to order that the BANK utilize the certificate. The law affecting this question can be clearly applied to the facts

The general intent of the Utah legislature that written agreements should be enforced according to their terms is expressed in Utah Code Ann. 1953, as amended, §70A-9-201:

> General validity of security agreement--Except as otherwise provided by this act, a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors (Emphasis added).

Regarding agreements with respect to default, the Code states:

> [t]he parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable. . . .
>
> Utah Code Ann. 1953, as amended, §70A-9-501(3)

Also, in the section dealing with the purpose of the enactment of the Uniform Commercial Code, it is stated:

> The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
>
> The presence in certain provisions of this act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under Subsection (3).
>
> Utah Code Ann. 1953, as amended, §70A-1-102(3)-(4).

The above authority firmly supports KENNEDY's contention that the undisputed written agreements among the parties regarding collection on the note should be enforced according to their terms, including enforcement against BARTON.

If, however, the note co-signed by BARTON is viewed as the original contract and the agreements regarding the collateral certificate are viewed as a subsequent modification of that same contract, the collateral agreements are nevertheless enforceable according to their terms. See Birckart v. Greater Arizona Savings & Loan Association, 103 Ariz. 166, 438 P.2d 403 (1968), Pryor v. Bond, 110 A.2d 539 (1955); Nicholson v. Smith, 98 C.A.2d 163, 219 P.2d 39 (1950).

In Birckart, ruling under Arizona Revised Statutes §44-519, Subparagraph 4, which is identical to §70A-3-604, Subparagraph 2, Utah Code Annotated, as amended 1965, the court held as to the effect of an oral accord and satisfaction:

> As between the original parties there is no difference between a note payable to X and one payable to the order X; the difference appears only after the note comes into the hands of a holder in due course, at which time the latter note, being negotiable, gives the holder a right of action free of certain defenses against X, while the former, being nonnegotiable, does not.
>
> We may, therefore, regard the note in the instant case, as a simple contract for the payment of money, and--even though it may be in writing--it may be varied or discharged by a new oral contract. 6 Williston on Contracts (Rev. Ed.) §1828. See also 2 Restatement of Contracts, §417.

> We hold, therefore, that under both contract law and the N.I.L., an oral accord and satisfaction will discharge the simple contract for the payment of money. 404 P.2d at 405.

Numerous other cases support the rule that collateral oral agreements of the parties may be introduced to explain the written contracts. For example, in an action to recover personal property retained by a purchaser on real estate sold to him by vendors, Harmon v. Waugh, 414 P.2d 119 (Colo. 1966), the Supreme Court of Colorado held:

> The court did not err in admitting the evidence offered in order to determine the intent of the parties. There is a wealth of authority to support the proposition that the "Parol Evidence Rule" does not operate to exclude oral agreements in explanation of a written instrument which patently does not contain all the terms and conditions of the contracting parties. See, 4 Williston on Contracts, §630(3d Ed., 1961); 3 Jones, Commentaries on Evidence, §1490, 1491 (2d Ed., 1929); 9 Wigmore, Evidence, §2430 (3d Ed. 1940).
>
> In Coulter v. Anderson, 144 Colo. 402, 357 P.2d, we find the following pertinent language:
>
> "Whether a contract was intended by the parties as an integrated one is, as indicated above, a matter of intention. See 3 Williston, Contracts §633 and 3 Corbin, Contracts §581. Where it is shown that a writing was not intended to be fully integrated, terms other than those set forth in the writing may be proved by parol evidence, Fleming Construction Co. v. Scott, 141 Colo. 499, 348 P.2d 701.
>
> 414 P.2d at 121. Accord. Cromwell v. Gruber, 490 P.2d 1285 (Wash App. 1972).

The well-reasoned case of Sykes v. Everett, 83 S.E. 585 (N.C. 1914) dealt with a fact situation similar to the one in the instant case. There, the endorser of notes endorsed them with the oral agreement that in case of default, the endorsee would not proceed against him until the collateral was exhausted. The court held not only that evidence of the oral agreement was admissible to explain the signature on the note, but also that the payee was bound by this agreement. The court explained:

> [w]hen a payee or regular endorsee thereof writes his name on the back of a note, as between him and a bona fide holder for value and without notice, the law implies that he intended to assume the well-known liability of an endorser, and he will not be permitted to contradict this implication; "but this rule does not apply between the original parties to a contract which is not in writing, although there may be the signature of one or more parties to authenticate that some contract was made. In such cases it must always be a question of fact what contract the signature authorizes to be written above it; in other words, what was the agreement of the parties at the time it was written. There is no written contract to be altered; the whole (except the signature, which by itself does not make a contract) exists in parol, and must be established by such proof."
>
> 83 S.E. at 588.
>
> The cases relied on by plaintiffs, holding that a creditor having collateral security for his note, may, notwithstanding this fact, sue the debtor without first resorting to the collateral and exhausting it (Jones, Collateral Security §686; Silvey v. Axley, 118 N.C. 959, 23 S.E. 933), are clearly not in point, because here the endorser has not only deposited the collateral, but required a further agreement that his endorsee should not proceed against him until it is exhausted. . . .
>
> 83 S.E. at 590.

The foregoing authorities firmly establish that the existence of the undisputed written agreement (Exhs. 17-P and 21-P) which provided that the certificate of deposit would be a source of funds on default, as explained by the verbal testimony, should be upheld. The reasoning of the Sykes case, as applied here, means that BARTON's certificate should be used to discharge the note to the extent thereof, even if there were a separate agreement that BARTON would not be personally liable for a deficiency.

B. This court has the power to require entry of judgment in accordance with a correct application of the law to the facts.

This court need not make new findings on any of the issues concerning the point above discussed. All of the facts cited are undisputed, with the exception of the fact concerning whether or not there was an oral agreement that the certificate would be used first. A determination of that point is not necessary. The court can properly construe that the bank had the right to pursue KENNEDY in the prior Sanpete County action (Exh. 58-d) and, failing to collect from KENNEDY, to enforce the obligation against BARTON. The simple fact is that the BANK has continued to harass KENNEDY without any effort whatever to collect against BARTON or against the certificate. Irrespective of what the application of the law would have been in 1973, the facts

as viewed under the law in 1978 should require that the BANK take the certificate.

In several different ways in the Complaint, plaintiffs requested that relief, i.e., Second Cause of Action (Paragraphs 21-23) of Amended Complaint, (R. 105), the Seventh Cause of Action (Paragraph 40, R. 112), the Eighth Cause of Action (Paragraph 43, R. 113) and the Tenth Cause of Action (Paragraph 49, R. 114), and all said causes of action were dismissed as a matter of law by the court (R. 570, 1060 and 1061). These dismissals, as applied solely to the question of the offset of the savings certificate against the note, were wrongful. Under §76(a) Utah Rules of Civil Procedure, the Supreme Court may reverse any order or judgment and may direct the trial court to enter judgment as corrected. Appellants' request that the court require offset of the certificate against the obligation for the reasons above-stated.

C. The doctrine of res judicata does not bar the relief sought by appellants.

In BARTON's Fourth Defense (R. 129) and THE BANK OF EPHRAIM's Third Defense (R. 142), defendants' claim that the doctrine of res judicata will bar the relief sought by appellants. Specifically, by reason of the judgment obtained against KENNEDY in the prior action (Exh. 58-d), it is asserted that the court no longer has power to require enforcement of the obligations

against BARTON or the require use of the savings certificate in partial discharge of the KENNEDY judgment. The trial court's dismissal of plaintiffs' Second, Seventh, Eighth and Tenth Causes of Action or the portions thereof relating to the Certificate of Deposit, may have been based on the question of res judicata, at least in part. Appellants here submit that the doctrine of res judicata does not apply.

Res judicata is a doctrine well recognized in the State of Utah, but has limited application. In Richards v. Hodson, 26 U.2d 113, 485 P.2d 1044 (1971) the Utah Supreme Court stated:

> Strictly speaking the term "res judicata' applies to a judgment between the same parties who in a prior action litigated the identical questions which are present in the later case . . . . The rule of law is wise in that it gives finality to judgments and also conserves the time of courts, to judgments and also conserves the time of courts, in that courts should not be required to litigate matters which have once been fully and finally determined.

26 U.2d at 115 (Emphasis added). Accord. Belliston v. Texaco, Inc., 521 P.2d 379 (Utah 1974); Wheadon v. Pearson, 14 U.2d 45, 376 P.2d 914 (1962); East Mill Creek Water Company v. Salt Lake City, 108 U.315, 159 P.2d 863 (1945).

The related doctrine of collateral estoppel also requires identity of issues and prior adjudication on the merits. In Penachio v. Walker, 207 Kan. 54, 483 P.2d 1119 (1971), the court ruled that a prior action, brought by an insurance company without proper right of subrogation and which was dismissed on motion for summary

judgment for that reason, will not act as a bar to a subsequent action brought by the real parties in interest. The court stated:

> Although collateral estoppel is not as broad in scope as the doctrine of res judicata, the necessary elements which make the two doctrines applicable are much the same. Without reviewing all the necessary elements it will suffice for the purpose of this opinion to state that there must be a judgment on the merits which determines the rights and the liabilities of the parties based on the ultimate facts as disclosed by the pleadings or issues presented for trial [citations omitted] and neither doctrine operates to affect those who are neither parties nor in privity therein [citiations omitted].
>
> 483 P.2d at 1121 (Emphasis added).

The broad justification for the application of the doctrines of res judicata and collateral estoppel is that when a party has been heard on the merits on a particular issue, he should be precluded from litigating that identical issue in a subsequent action. See Home Owners Federal Savings & Loan Assn. v. Northwest Fire and Marine Insurance Co., 238 N.E.2d 55 (Mass. 1968); Gammel v. Ernst & Ernst, 72 N.W.2d 364 (Minn. 1955).

We will briefly specify the reasons why the prior action, including KENNEDY's counterclaim, did not bar the present claims of KENNEDY on the certificate as above argued:

1. KENNEDY's counterclaim in the prior action was not heard "on the merits," and was for a different cause. The counterclaim of KENNEDY in the prior action contained allegations concerning business damages from interference and slander, but no claim

was there raised about the certificate. In any event, there was no adjudication on the merits as to that counterclaim in the prior action and, therefore, res judicata or the more narrow collateral estoppel should not bar the present action. While there was a judgment for the BANK on the note in the prior action, KENNEDY's counterclaim was summarily dismissed without the taking of evidence or the hearing of argument.

KENNEDY was deprived of the opportunity of a hearing on the merits of his counterclaim in the prior action because he relied upon representations made by Judge Harding that, should he submit a motion for continuance and a supporting affidavit, a continuance would be granted due to illness of his wife. The proper motion and affidavit were filed and the continuance was not granted, much to the surprise of CHARLES R. KENNEDY's then counsel, Weston Bayles. Having relied upon the continuance, no case was prepared to be presented on the counterclaim and, therefore, the issues presented in the counterclaim could not have been heard on the merits.

2. The cause of action in the present action is not the same as that in the prior action. The prior action by THE BANK OF EPHRAIM against KENNEDY and BARTON sought judgment on a note. The present action is an action in tort; namely, for intentional interference with business relationships and slander, with additional claims relating to the certificate.

3. The parties in the two actions are not identica The prior action was brought by the BANK against KENNEDY and, nomi BARTON; KENNEDY's counterclaim in that action was directed solely against the BANK. The present action is against the BANK, its Directors and BARTON and his wife.

4. The issues raised in the present action were not adjudicated in the prior action. The issue before the court in The Bank of Ephraim v. Kennedy (Exh. 58-d) was liability on the no Appellants contend that the judgment established only that the note was in default and that KENNEDYS were liable on the note, not how that liability was to be satisfied, and without any refere to BARTON or the certificate. This theory is supported in that various courts have described a judgment for the recovery of money as a debt, evidence of a debt, or record of a debt. See 46 Am.Jur Judgments §232 (1969).

In J & G Construction Co. v. Freeport Coal Co., 129 S.E. 834 (W.Va. 1963), an action for execution on a judgment, the Supre Court of Appeals of West Virginia described a judgment on prior in debtedness as "a new debt of the highest dignity." 129 S.E.2d at 838 (Emphasis added).

The United States Supreme Court in Provident Savings Life Assurance Society v. Ford, 114 U.S. 635 (1885) described a judgment for recovery of money as "a security of record showing a debt due from one person to another." 114 U.S. at 641.

Appellants therefore assert that the judgment in The Bank of Ephraim v. Kennedy represents a debt due on the note--that the KENNEDYs, some of the defendants in that action, were liable on the note.

Entirely different issues, the alleged contravention of written and oral agreements regarding collection on the note and satisfaction throught the collateral, are involved in the present action. KENNEDY's liability on the note, at least in this situation with the security agreements, does not necessarily determine the obligations of the parties with respect to collection on the note as against BARTON and the collateral.

Appellants respectfully submit that the requirements for application of the doctrines of res judicata and/or collateral estoppel are not present, and the trial court erred if it dismissed appellants' causes of action relating to the certificate on the grounds that they were barred by the prior judgment.

II. THE TRIAL COURT ERRED IN CERTAIN INSTRUCTIONS TO THE JURY.

A. The trial court improperly refused to give plaintiffs' proposed Instructions Nos. 2, 6, 16 and 17.

Most of the instructions complained of are intimately tied in with the foregoing arguments relating to the Certificate of Deposit. The instructions are erroneous if they mislead the jury. This case presents a fairly unique situation by reason of the way the court divided up the rulings of law as compared with

the issues submitted to the jury. More specifically, the court submitted to the jury plaintiffs' Third Cause of Action (damages suffered by reason of interference with business transactions in Montana), plaintiffs' Fourth Cause of Action (covering essentially the same subject matter) and parts of plaintiffs' Fifth Cause of Action (relating to interference by the defendants with plaintiffs' attempts to sell the Barton Syndicate claims). If the BANK had previously applied the collateral savings certificate in the manner argued under Point I. above, the BANK would not have maintained a judgment with which it could levy a writ of attachment on certain Montana property owned by plaintiffs (Exh. 35-P). The jury was entitled to know that the BANK had nearly allowed the statute of limitations to go by on the enforcement of the note against BARTON (plaintiffs' proposed Instruction No. 2, R. 494), was entitled to know about the effect of oral modification of written agreements (plaintiffs' proposed Instruction No. 6, R. 498) and was entitled to know the effect of the language on the promissory note signed by GEORGE BARTON to the effect that payment was guaranteed (plaintiffs' proposed Instruction No. 17, R. 508, and Exh. 21-P). In a similar manner, the actual Instructions Nos. 25, 26 and 27 (R. 468-470) giving the impression that the holder of the note could sue either obligor it chose, were misleading under the facts and the law of this case. As argued under Point I. above, the law

as applied to the facts in the record should have required THE BANK OF EPHRAIM to take the Certificate of Deposit and to enforce the obligations against BARTON along with enforcement against KENNEDY. Since the jury was improperly instructed in the law on those points, the jury was misled when it considered the claims for damages resulting from THE BANK OF EPHRAIM's harassment of KENNEDY under the Third and Fourth Causes of Action. Either the jury should have been able to consider the correct law in balancing the factual determinations it had to make or the court was erroneous in not applying the Certificate of Deposit and thus eliminating the question of attachment on the judgment.

The relief sought by appellants under this point is either a new trial on the issues submitted to the jury or, preferably, the relief applying the Certificate of Deposit as argued under Point I. above.

Appellants have also complained about the failure of the court to give plaintiffs' proposed Instruction No. 16 (R. 507) relating to the law of contribution. This matter concerns the judgment rendered by the verdict on BARTON's Fifth Cause of Action under the counterclaim (R. 487 and 548). That judgment arose out of a note with The Barclay's Bank in California on which Barton was a guarantor along with KENNEDY (Exh. 42-d). BARTON paid the balance of that note and obtained judgment in this action for the full amount paid by him. It is the position of appellants that

BARTON's remedy should have been only contribution for one-half of the amount due rather than the entire amount.

The relevant law is:

> Where two or more co-obligors are jointly or jointly and severally liable upon a contractual or quasi-contractual obligation,and the creditor recovers judgment thereon, an obligor who is compelled to pay the whole or more than his share of such judgment may, as a general rule, recover contribution from his co-debtors therefor.
>
> 18 Am.Jur.2d, "Contribution" §58.
>
> Where a party is entitled to contribution, the general rule is that the measure of his recovery should not be the entire amount paid upon the principal obligation, but only the amount he has paid in excess of his share.
>
> 18 Am.Jur.2d, "Contribution" §15.

The Guaranty should as Exh. 42-d clearly evidencing that KENNEDY and BARTON were jointly and severally liable for The Barcla Bank obligation. Under the applicable law, therefore, BARTON's sole remedy should have been one-half of the amount he paid and not the entire amount. Accordingly, the court's refusal to give plaintiffs' proposed Instruction No. 16 (R. 507) relating to contribution was erroneous. In addition, the actual Instruction No. 24 (R. 466) relating to The Barclay's note was similarly erroneous because it set up the grounds for liability without specifying the applicable law of contribution.

The relief sought by appellants under this point is straightforward, i.e., the court should order the judgment on

BARTON's Fifth Cause of Action of the counterclaim reduced to half the present amount.

B. Certain jury verdicts and judgments thereon are improper.

BARTON's Third Cause of Action on the counterclaim sought $12,500.00 as a result of claimed proceeds from the sale of a 10% interest in the Barton Syndicate. The instruction concerning this matter is No. 21, R. 463. The basic evidence is that KENNEDY and BARTON sold to a Jerome D. Kennedy of California a 20% interest in the Barton Syndicate (10% from each of C. R. KENNEDY and BARTON) for the sum of $25,000.00 (Exh. 38-d). BARTON's half of that money was not remitted to him. In a separate transaction involving the Barton Syndicate, KENNEDY purchased 25% of the Barton Syndicate from a Mr. Rosenberger of California for the sum of $1,000.00 (Exh. 50-P). KENNEDY thereafter gave to BARTON one-half of the interest purchased from Rosenberger or 12-1/2%. The net effect was that BARTON sold 10% to J. D. Kennedy and received 12-1/2% back from the Rosenberger part of the transaction, thus ending up with a net gain of 2-1/2% without any transfer of money whatever. BARTON admitted that he received 12-1/2% from the Rosenberger transaction (R. 974).

The jury, contrary to the instruction in the facts and the law, gave judgment for $12,000.00 to BARTON against KENNEDY (R. 486 and 561), having taken the $12,500.00 on one transaction

and offset $500.00 on the other transaction. Neither Instruction No. 21 (R. 463) or any of the other instructions permitted the jury to do that. Moreover, Instruction No. 21 improperly denied the plaintiff the opportunity to have set forth to the jury the possible finding that since BARTON was made more than whole by getting 12-1/2% from the Rosenberger deal, the plaintiff KENNEDY was not obligated to return the money obtained on the J. D. Kennedy portion of the transaction. The net effect is, that KENNEDY made the good deal and at the same time enriched BARTON by a net gain of 2-1/2% in the Barton Syndicate.

The relief sought by appellants here is either a new trial on the issue of BARTON's Third Cause of Action of the counterclaim, or, preferably, a direction from this court that since BARTON was made more than whole by receiving 12-1/2% in exchange for his 10% in the Barton Syndicate, the judgment rendered on the Third Cause of Action of the counterclaim should be null and void.

CONCLUSION

Based on the foregoing facts, law and arguments, appellants respectfully request that this court modify certain portions of the orders and judgments below in accordance with the specific requests made under each point of argument above.

Respectfully submitted,

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By _____
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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Appellants' Brief were mailed, postage prepaid, this 19th day of July, 1978 addressed to the following:

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